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ABSTRACT

During the summer of 1978 the College Board sponsored a series of six seminars throughout the United States to provide a forum for discussion of the Supreme Court's decision on the case of Regents of the University of California v. Allan Bakke. The first section of this report summarizes the discussions in the seminars, outlining the salient issues raised. Appended are three background papers prepared for the College Board: "The Decision in Regents v. Bakke: Legal Implications for the College Admissions Process" (Alfred B. Fitt); "Some Educational and Social Implications of University of California v. Bakke" (Warren W. Willingham); and "Implications of the Bakke Decision for Undergraduate Admissions Policies and Practices" (prepared by a team of practicing admissions officers). A list of the seminars and speakers is included. (MSE)

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THE BAKKE DECISION: RETROSPECT AND PROSPECT

Summary Report on Six Seminars Held by
the College Board

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THE BAKKE DECISION: RETROSPECT AND PROSPECT

Summary Report on
Six Seminars Held by the College Board in
July and August 1978

Charles M. Holloway
Director of Special Projects

College Entrance Examination Board, New York, 1978

Complimentary copies of this booklet have been sent to the representatives of all members of the College Entrance Examination Board and the College Scholarship Service Assembly.

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Introduction

As part of its traditional forum function, the College Board began in early 1978 to plan for a series of meetings to be held in various regions of the country to enable college admissions officers and other educators to consider and discuss implications of the U.S. Supreme Court's decision in the case of Regents of the University of California v. Bakke. We knew that the Court would be taking action at roughly mid-summer, and we made our plans to follow their announcement within two weeks for the first seminar.

Preliminary inquiries indicated that hundreds of colleges and universities would be interested in attending these seminars, and following the Court's decision June 28, invitations were sent out to institutions of higher education around the country. The meetings were scheduled for a period beginning July 24 and ending August 10, and approximately 500 individuals from a range of public and private institutions participated in Boston and Atlanta (July 24); Evanston and Philadelphia (August 1 and 3); Dallas and San Francisco (August 8 and 10). An appendix to this report lists the locations and major speakers on the several programs.

Three background papers were commissioned and distributed in advance of the seminars, and these formed the basis for a

common agenda in each city. The first paper by Alfred B. Fitt, General Counsel, Congressional Budget Office, dealt with the legal implications of the decision. The second, by Warren W. Willingham, Director of Program Research at Educational Testing Service, considered educational and social implications of the decision. The last paper, focusing on implications for undergraduate admissions policies and practices was prepared by a team of admissions officers. The three papers follow Mr. Holloway's report in the form in which they were originally distributed. The seminars were sponsored as a public service by the College Board, and were supported in part by a grant from the Ford Foundation.

The College Board has been committed to what is now known as affirmative action since the late 1950's, well before the civil rights movement became mobilized. Test centers were quietly but effectively desegregated. Support was given to Project 43 in New York City, one of the earliest guidance and talent search projects. Staff time and talent, as well as corporate dollars, were later invested in subsequent large scale efforts such as Project Talent and Project Opportunity. Fee waiver programs for the Board's major testing programs were introduced. Responsibility was assumed for the Upper Division Scholarship Program and the Engineering Scholarship Program for Minority Community College Graduates on behalf of

two-year college transfer students. Special publications such as Mexican Americans in School: A History of Educational Neglect were produced and distributed. And a variety of meetings, training sessions, workshops, and seminars were sponsored dealing with the admission of under-privileged, disadvantaged, and minority/poverty students as they successively became known.

The most recent of these forum activities was the series of Minority Seminars, sponsored jointly with Educational Testing Service, held during 1977 to redirect attention to urgent issues in the education of minorities. The Bakke seminars of the summer of 1978 followed in this last tradition and were designed to illuminate the implications of the Supreme Court's decision in the case of Allan Bakke versus the University of California most specifically as they relate to undergraduate admissions.

Charles Holloway and I attended five of the six seminars and have experienced the sixth via audio-tape. We were privileged not only to observe six deft chairmen handle the presentations of eighteen articulate, informed and provocative respondents to the three background papers, but also to hear voiced the questions and concerns of vitally interested college admissions officers. Holloway's report presents a remarkably faithful and comprehensive picture of the presentations and discussions at the six seminars, each of which in its own way put the Court's decision in unique perspective. By way of preface to his analysis, I would offer only these few observations.

While the College Board continues its corporate commitment to the concept of affirmative action, that action must ultimately take place in the individual admissions offices of the nation's colleges and universities. The Court's judgment in the Bakke case affirmed the freedom of each higher institution to establish its own admissions policy. . . and went on by a 5-0 vote (not 5-4 as erroneously reported by many observers) to sanction the use of race in the selection process. It was our hope in convening the six seminars that their deliberations would begin to provide guidance to undergraduate admissions officers on ways in which the cause of affirmative action on each campus could be sustained and strengthened.

Our expectations were more than fulfilled, and the College Board is grateful to the authors of the background papers, to the respondents and provocateurs, and to the participants for their part in helping early on to illuminate the implications for undergraduate admissions of the decisions and opinions of the Supreme Court in the case of Allan Bakke vs. the University of California. The Board will continue its efforts to assist in the further interpretation of the Court's action to the end that each college or university will be able in its own way to establish policies which will foster the effective pursuit of affirmative action.

George H. Hanford
Senior Vice President
The College Board
August 1978

THE BAKKE DECISION: RETROSPECT AND PROSPECT

It promised to be the best of times (for lawyers) and the worst of times (for quotas). It presumed a new age of wisdom (for admissions officers) and suggested an epoch of litigation. It evoked incredulity on the part of some, and optimism by others. It stranded colleges somewhere between the rock of Title VI and the hard place of the 14th Amendment. It was, in short, the decision of the U.S. Supreme Court in the case of the Regents of the University of California v. Allan Bakke.

Over a three-week span in late July and early August of 1978, some five hundred of the nation's leading college admissions officers and administrators met on six different campuses to consider what impact the Bakke decision would have on the admissions process. Their deliberations focused on three background papers and on sequential presentations at each seminar by lawyers, social scientists, and admissions officers.

From the outset it became clear that the decision raised many more questions than it answered, and, as one participant put it, "guaranteed full employment for lawyers" for years to come. As the meetings progressed it also became apparent that participants brought with them a range of personal and institutional concerns, preconceptions, and anxieties. Once, over a decade ago, the dean of admissions at MIT, B. Alden Thresher, summed up the process of admission to college as "a

great sorting, not fully understood by the students themselves, by their parents and advisers, or by the educators, including admissions officers, who participate in it." The sorting process, Thresher said, is a product of "an immense number of individual choices and decisions taken by millions of people, under the influence in part of calculations and estimates projected a generation into the future and in part of beliefs, opinions, whims, and ancient loyalties." He added that access to education remains essentially a social process "deeply involved with the society's entire cultural pattern and system of values." And therein lies the heart of the Bakke case and its effect on American society today and tomorrow.

In the course of the seminars, both participants and speakers examined the ebb and flow of social and political forces involved, and discussed basic differences of opinion over whether the public (through Congress) should decide such issues as Bakke, or whether the courts should rightly have the final word. The narrowness of the Court's two-part decison was repeatedly noted during the seminars and characterized as symptomatic of the societal schisms on the issues of equal opportunity and affirmative action programs.

The many ramifications discerned in the Bakke case and presented in the seminars tend to bear out Justic Holmes' observation that the law is like "a magic mirror. . .wherein we see reflected not only our own lives but the lives of all men

that have been."

In attempting to summarize the essence of the discussions, it is important first to lay out the basic nature of the Bakke case, and to present in digest form the action taken by the Court. The resume of the case that follows is extracted from the admissions team paper for the seminars:

> In 1973, the University of California at Davis had two admissions programs for the entering class of 100 students in its Medical School. The regular admissions program for 84 of those places had a minimum overall undergraduate grade-point-average requirement of 2.5 on a scale of 4.0. About 1 out of 6 of the applicants having met that requirement was interviewed. Each of the regular admissions committee members rated each interviewed applicant (on a scale of 1 to 100), on the basis of the interviewers' summaries, the overall grade-point-average, the science courses' grade-point-average, the Medical College Admissions Test Scores, letters of recommendation, extracurricular activities, and other biographical data. The full regular admissions committee then made offers of admission on the basis of its review of the applicant's file and the "benchmark score" (the total of the committee members' ratings).
>
> The special admissions program was operated by a separate committee, the majority of whom were members of minority groups. If an applicant asked to be considered as "economically and/or educationally disadvantaged," and was judged by the special admissions committee to be so disadvantaged, he or she was rated in a manner similar to that used by the regular admissions committee. However, the special admissions applicants did not have to meet the minimum 2.5 overall undergraduate grade-point-average cutoff, and were not ranked against the regular admissions applicants. The top choices of the special admissions committee were referred to the regular admissions committee, who could deny admission for failure to meet course requirements or other specific deficiencies. This process was continued until 16 special admissions selections had been made.
>
> Allan Bakke applied for and was considered for regular admission in 1973 and 1974. In 1973 he was denied admission because his benchmark score of 468 out of 500 was below the minimum 470 score in effect for regular admissions that year. In 1974 he was rejected with

a benchmark of 549 out of 600. In both years special admissions applicants were accepted with significantly lower benchmark scores than Bakke's.

Mr. Bakke then filed suit in state court on the grounds that his exclusion from consideration within the special admissions program was in violation of the Equal Protection Clause of the Fourteenth Amendment, the California Constitution, and Section 601 of Title VI of the Civil Rights Act of 1964. The trial court declared that the special admissions program did violate the Federal and California Constitutions and Title VI but did not order Bakke's admission. The California Supreme Court held that the special admissions program violated the Equal Protection Clause and ordered Bakke's admission to the Medical School.

Warren Willingham's paper perhaps best digested the nature of the Court decison, and, in part, his analysis follows:

> The court's action in Bakke consists of a) two one-paragraph decisions, each supported by a largely non-overlapping majority of five Justices; b) some ten pages of factual background information with which five Justices concur; and c) some 140 pages covering six minority opinions supported by one to four Justices. The exact language of the decisions helps one to appreciate their sparseness. The following two paragraphs quoted from Justice Powell's announcement constitute the full Bakke decision:
>
> > "For the reasons stated in the following opinion, I believe that so much of the judgment of the California court as holds petitioner's (University of California) special admissions program unlawful and directs that respondent (Allan Bakke) be admitted to the Medical School must be affirmed. For the reasons expressed in a separate opinion, my Brothers THE CHIEF JUSTICE, MR JUSTICE STEWART, MR JUSTICE REHNQUIST, and MR. JUSTICE STEVENS concur in this judgment.
> >
> > I also conclude for the reasons stated in the following opinion that the portion of the court's judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed. For reasons expressed in separate opinions, my Brothers MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN concur in this judgment.

There are perhaps two other points of reference that might be useful to a review of the seminars, 1) the provisions of Title VI, Section 601, of the Civil Rights Act of 1964; and 2) the Equal Protection Clause of the Fourteenth Amendment. Title VI provides that:

> No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in. . . any program or activity receiving federal financial assistance.

The Fourteenth Admendment equal protection clause reads "No state shall. . . deny any person within its jurisdiction the equal protection of the laws."

Legal implications. . . the dawning of a litigious society?

While the seminars were basically structured and organized to follow the three rubrics of legal, social, and admissions implications, it was inevitable that the three would flow together as presentations and discussions began. Careful attention by the legal experts to various details of the case and to the many shades of interpretations in the amplifying opinions of the several justices repeatedly led the participants into social, economic, and educational consequences of the decision. The two paragraphs and sixteen printed lines of the court's decision were followed by 140 pages of background and opinion by the justices, and this in essence formed the substance of the seminars.

As Alfred Fitt notes in the conclusion of his paper, "five members of the Supreme Court have declared legal and constitutional,

and none has declared illegal or unconstitutional, the consideration of race in selecting students." And, Fitt continues, "many colleges have already been following that course, because to do so seemed socially and educationally imperative. They now have a consitutional blessing to stay on course."

Six different legal experts with a range of special talents, interests, and backgrounds in the law analyzed the implications of the Bakke decision for the seminars. While there were some divergencies and carefully drawn nuances in their presentations, most agreed on salient points in the decision, and most felt that new and heavy responsibilities had been placed upon college admission officers. There was also considerable agreement that the decision had outlined some permissible areas of action for institutions along the lines expressed by Mr. Justice Powell, when he said that "the freedom of a university to make its own judgments as to education includes the selection of its student body."

There were shades of disagreement among the lawyers on exactly how colleges and universities might safely go about this selection, and about what kind of guidelines might have been given by the Court. Daniel Steiner, General Counsel to the University, Harvard University, for instance, saw much uncertainty and ambiguity in the decision. He detected "signals but no clear road map" for affirmative action in undergraduate admissions programs. James B. Wilson, Senior Assistant Attorney General, University of Washington, agreed that

there had been little specific guidance, and suggested the Harvard model, appended to the decision, was in some ways a "retreat into obfuscation." Phyllis Beck, Vice Dean, University of Pennsylvania Law School, felt that the Court had given no precise answers and that these might be evolving over the next ten years. She urged institutions not to wait for further decisions and interpretations, but to take the initiative and to reform, where necessary,their own plans, policies, and goals to meet the evolving needs of institutions and of applicants, in the broadest social context. Beck said the Court had probably been imprecise on purpose and meant to leave much discretion to institutions.

In reflecting on the decision, Steiner suggested four useful directions on the otherwise vague "road map." First, that there should be no more quotas or "set-asides" in admission programs. Goals or targets might be permissible, he said, but even these might be dangerous.

Second, Steiner urged the avoidance of any "indicia of separateness" in making admissions selections. Third, he advised institutions in the future to articulate clearly their admission policies, noting whether or not diversity is a goal, and listing other factors involved in the process. Finally, he noted that thing in the decision prevents specific recruiting efforts by institutions to enroll more minority students.

As the legal considerations progressed, focus often returned to the vital distinction between decision and opinion on the part of

the Court, and several of the presenters took care to distinguish meticulously between these elements, noting the pivotal role played by Mr. Justice Powell in delivering his opinion. While Powell says a racially diverse student body is a good thing, the Court per se is not necessarily saying the same thing. In seeking perhaps to emulate the Harvard model, appended to the Powell opinion, universities were urged to exercise both care and restraint because, while important and enlightening, Powell's views were simply that, his views, not those of a majority of the court.

The lawyers were in agreement in their various analyses that the Court's decision was a complex and divided one, demonstrating the Court's preference to decide such cases, if at all possible, on statutory (through Title VI, Sec. 601) rather than constitutional issues, but at once demonstrating also that Bakke offered a formidable challenge to such a preference and resulting in sharp differences of opinion, differences that may have eventual bearing on subsequent court cases in the whole area of discrimination and individual rights.

Barbara Aldave, Professor of Law, University of Texas at Austin, noted that four of the nine Justices (the "Stevens quartet"), did not address constitutional aspects at all, but analyzed the case under the statutory provisions of Title VI, Section 601, which applies to both public and private institutions receiving federal funds. For this group, (Berger, Stewart, Rehnquist and Stevens),

there was a clear violation of Section 601 and the constitutional provision was not needed. Justice Powell moved quickly past Title VI, and addressed the provisions of the 14th Amendment, finding the University of California at Davis arguments unacceptable and in disregard of individual rights as guaranteed by the constitution. He then cites and endorses the Harvard plan as being "the kind of a program that treats each applicant as an individual."

The remaining four Justices, however, the so-called "Brennan quartet," (Brennan, White, Marshall, Blackmun), did not agree, and delivered the opinion that the plan used at the University of California at Davis was appropriate and legal, especially since it used race as an element in its search for an integrated student body necessitated by the "lingering effects of past discrimination." These men saw no constitutional distinctions between the Davis plan and the Harvard model cited by Mr. Justice Powell, noting that "there is no basis for preferring a particular preference program simply because in achieving the same goals that the Davis Medical School is pursuing, it proceeds in a manner that is not immediately apparent to the public."

Powell disagrees and believes that Davis deliberately discriminated against whites and Harvard did not. He says the outcomes might be alike, but the means for producing them were not, and he quotes Justice Frankfurter from an earlier decision who states "a boundary line is none the worse for being narrow."

Hence again the importance of the Powell "swing" vote is underlined. While there are five current votes for the Harvard concept, additional votes for it, may, as Fitt suggests, "be lurking in the Stevens quartet, awaiting the time and the case. . . . appropriate to declare themselves."

The possible ambiguities in the decision as it related to a comparison of the Harvard and Davis plans were noted by others, including Terrence Sandalow, Dean, School of Law, University of Michigan. He raised questions about the basic differences between the two approaches, and suggested that if the Harvard plan were carried far enough it would involve quotas. Willingham, in his background paper, also questions whether many institutions could realistically use or adapt the Harvard plan due to costs and complexity of operation.

Phyllis Beck agreed that the Harvard model was not typical of most institutions of higher education, nor suitable for them in their admission planning, and there was general agreement among participants in the several cities that because of the diverse nature of American higher education and the preponderance of public institutions, the concentration on the highly selective Harvard practices was inappropriate.

Constitutional expert Robert F. Cushman, Professor of Government, New York University, saw no clear prevailing court theory in the Bakke case, but he thought that Mr. Justice Powell's reliance on the Harvard plan (which he called elusive and unclear)

was an exercise in "intellectual sleight of hand." Cushman suggested that there was a national history of discriminating against people on the basis of race, religion, language, etc., and that we could not now count on the white majority to change -- ". . .charity of spirit," he noted, "is not a dominant human virtue." He said he believed that what the Brennan group hoped to do is break down this habit pattern -- or permit government to break it down -- even if it means reverse discrimination for a while. Cushman, however, did not think that this would work, and that in the long run minorities would suffer from such an approach.

He suggested that rather than try to adapt or emulate the Harvard plan, institutions should seek "truly race-free admissions policies" of their own and should supplement these by strong remedial programs for students on campus -- black or white. As one alternative approach to admissions, Cushman proposed that there might be a national lottery among all qualified students for available places. Several participants questioned his seriousness about this idea and challenged its viability or advisability.

When asked about past and current government pressure for quotas, Cushman said there was an obvious ambiguity abroad now with the Bakke decision on the one hand and various federal mandates on the other; but he indicated that he detected a move away from quotas. He said that Secretary of HEW Joseph Califano, for instance, had not officially responded to the Bakke decision, and might be prepared to recede on some quota pressures by his

department. In response to another question, Cushman said he believed that Bakke would eventually be affecting other segments of society, such as labor and business.

Some interesting observations about what the Bakke decision did not say about admissions came from Sandalow, who said that first of all, the case had no bearing on the many factors that might be involved in admissions decisions -- alumni preference, athletic ability, etc. The decision, he said, applied only to race as an element in the process. Second, he said the decision would have little effect on nonselective admissions procedures. Third, he said it was probably irrelevant for programs that could demonstrate a prior history of discrimination against minorities. And finally, he suggested that the case would have no effect on nongovernmental institutions or upon nonrecipients of federal funds.

Conversely, Sandalow listed some possible implications that may emerge from the decision. Institutions, he believes, may take race into account in their search for diversity, but he noted that Mr. Justice Powell does not take into account cutoff procedures being used by some professional schools which would effectively rule out all minorities in some cases. How, Sandalow asked, can these procedures be adjusted to admit minorities -- how can race-consciousness best be used in such cases to achieve diversity? The burden is upon admissions offices to find creative (and legal) ways, but Sandalow thinks it may be

done. Third, he asserted, as mentioned earlier, that the differences between the Harvard and Davis plans are elusive, and advised colleges and universities to remain as flexible as possible in their policies, to avoid fixed quotas and numbers of minorities being sought.

The split nature of the court decision between statutory and constitutional grounds creates some further difficult problems for institutions of higher education in the broad realm of public and private control. Public or tax-supported colleges and universities now enroll about 80 percent of all students, whereas a quarter-century ago enrollments were almost evenly divided between public and private. Many, if not most institutions today receive federal funds under one program or another, including billions of dollars in student aid monies. Hence, the seminars found legal experts often examining the theme of control, and how the Bakke case might affect it now and in the future.

Charles A. Shanor, Professor of Law, Emory University, suggested that state and private institutions had a different set of problems. States, he indicated, might fall back on the "sovereign immunity" provisions of the constitution, but he felt this position was weakening in light of the decision and other federal moves, and that schools were being regarded as a subdivision of the state and hence not immune.

He felt that charitable and not-for-profit institutions were

also losing some of their immunity, and viewed the provisions of Title VI as having contributed to the encroachment.

There was considerable discussion in the Atlanta seminar about the conflicting pressures on states from the U.S. Department of HEW under the Adams v. Califano case and the new court decision on Bakke. Ten states, mostly in the south, are under order from HEW to desegregate their systems of higher education via the original Adams v. Richardson case, and several are well along in their plans. Shanor felt, in response to questions, that compliance with HEW-ordered actions could make these states exempt from further court rulings emerging from the Bakke case, on the grounds of making up for past discrimination.

Another perspective was provided by Sandalow in response to a question at the Evanston meeting, Sandalow was asked if the Title VI regulations applied to all parts of an institution receiving federal funds, and responded that he believed the rulings were usually seen as applying only to specific programs receiving funds directly, and did not generally constitute blanket coverage of the whole institution. He added, however, that most institutions receiving GI Bill money and federal loan guarantees for their students would be vulnerable to the Bakke ruling.

Aldave felt that the Bakke decision would affect all types of institutions of higher education, and that while Congress

might eventually alter Sec. 601 as a reaction to the case, this was not imminent.

Mr. Justice Powell's concentration on the diversity theme as it applied not only to Davis, but also potentially to undergraduate institutions stimulated some discussion about where and when and how institutions might best begin the search for a diverse student body. Consistently, the advice was to be flexible and innovative, to avoid quotas and numbers. Following Powell's arguments that racial diversity is important at the graduate/professional level, it was suggested that logic would also make diversity an important element in the undergraduate pool. In considering broader implications of this search for diversity, and for justification of the means used, Sandalow, who is himself referred to in the Court's decision (p. 41, Powell), questioned Powell's statement that "there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal" (the goal of encouraging minority doctors to return to disadvantaged communities to serve). Sandalow, while admitting the lack of extensive data, said that some studies, including his own, indicated that this goal had been achieved.

Another possible legal implication of the decision concerned several participants, namely, the relationship of the Court's action to financial aid programs and activities favoring minority students. Beck was questioned on this point

about the legality of a program which set aside a substantial amount of money to aid monority students upon admission to a college. She replied that such a "set-aside" would probably not be legal in light of Bakke, and cited the case of Georgetown University v. Flanagan, in which some 60% of university aid funds had been reserved for minorities and said that this had been ruled illegal. Shanor gave approximately the same opinion in response to a question in Atlanta about whether or not there could be some kind of earmarking of financial aid funds for minority students. He added, however, that there might be some loopholes in this area, through private bequests, for instance. There was some subsequent discussion to the effect that while all aid funds might need to be kept in a single pool, it would be possible (and defensible) then to package aid differently for different candidates -- that is, minority candidates could appropriately receive high proportions of grants, as opposed to loans or work-study activities, in light of their presumed educational handicaps.

One final legal aspect potentially affecting admissions officers was that centering around the issue of individual versus institutional responsibility for admission decisions. It was indicated that the Bakke decision may indeed complicate things here. Shanor, for example, raised the question of what was meant in the decision's statement that "government" could take race into account. How, he asked, is "government"

designated? Could it be a college admissions officer? He also raised the question related to Title VI of whether or not there was any private right of action, noting that most colleges now receive federal funds, hence are liable to be sued. Aldave recalled a New York state case in which warnings were given on the possible personal responsibilities of individual members of admissions committees, and suggested there could be more such suits emerging in the wake of Bakke. A few participants indicated that they knew of or were, in fact, themselves already involved in personal litigation over admissions decisions, but opinions were divided among legal experts on whether or not there would be a growing number of these cases in the immediate future.

Social and research implications. . . . . Bakke as the ultimate Rorschach test

Samuel Johnson once said that the law is "the last result of human wisdom acting upon human experience for the benefit of the public," but the assessments by participants of the emerging social implications of the Bakke decision were far from as sanguine as Johnson.

In the summer months immediately following the decision, including the period of the seminars, public opinion was, like the case, divided. Vernon Jordan, president of the National Urban League, writing in Newsweek in mid-August, spoke of "the new negativism" in the U.S., and characterized the Bakke case as a significant part of this mood, along with tax revolts, inflation

and unemployment, and fading urban policies. He said "the chilling effect of Bakke may pervade our society as discrimination hides behind supposedly race-neutral tests and qualifications to exclude minorities."

Robert A. Holmes, Professor of Political Science, Atlanta University, called the Bakke case a landmark case but not a landmark decision, and saw it as a middle-of-the-road compromise that will probably generate more rather than less social conflict in the country. He called the case a "fantasy come true" for lawyers, a "nightmare for admissions officers," and said that because of its many-faceted opinions, the Court case had, for the public, become "the ultimate Rorschach test," in which everyone could find some different symbol or meaning.

Holmes agreed with the opinion of Mr. Justice Marshall who felt that the case would have wide-ranging impact and result in the curtailment of black and minority progress. "Color blindness," Holmes said, "should not lead to myopia." He noted carefully that the court did not mandate affirmative actions programs for colleges and felt that the general tenor of the decision would be restrictive in the years ahead. Holmes noted that the Bakke case did not live up to advance billing or to expectations that it provide some clear guidelines for admissions programs, and he predicted that the end result would be a reduction in the percentages of minorities being admitted. This situation he characterized as one of "benign

neglect," that could easily spread.

In a similar vein James P. Pitts, Assistant Professor of Sociology, Northwestern University, and James Blackwell, Professor of Sociology, University of Massachusetts at Boston, both identified and analyzed vestiges of discrimination that exert important effects on the social and educational scene. Pitts predicted that a two-tiered admissions process would emerge and exacerbate the existing performance gap between whites and non-whites. He suggested that the court had cast real doubt on the historical rationale for undertaking affirmative action programs, and that the influential Powell opinion might affect some undergraduate programs and encourage retreat on the part of some commitments. He identified a research need for both educators and political leaders to initiate comparative studies of the academic and professional careers of minorities before and after Bakke.

Pitts discussed the ambiguous nature of the way race and color blindness were defined in the opinion and questioned the way in which affirmative action was seen as compensation for past discrimination only. He saw in the decision a blurring (perhaps purposeful) of historical and current forms and devices of discrimination and prejudice. He said the Court seemed to ignore the widespread and pervasive nature of discrimination and prejudice in the country today, and tended to

focus on the evils of the past rather than present realities. As another possible research need, Pitts urged a sustained effort to introduce data to enable judicial updating of what race is -- and is becoming. He said more studies were needed of the academic and social adjustment of students on various kinds of campuses, and also of the influence of Educational Testing Service and foundation leadership in aiding to communicate the process of affirmative action.

Pitts said he saw in Bakke "a green light" for affirmative action by institutions that are already committed, but wondered if the results of a confusing and complex court decision would have any widespread impact throughout all institutions in the country. He felt there was considerable latitude in the decision for temporizing, and worried about the "silent majority" on the Court who did not comment at all on what should be done by way of affirmative action.

In Boston, Blackwell also expressed the belief that in the wake of a less than unanimous decision, institutions must exercise care and leadership now to assure that existing affirmative action programs not be weakened or modified. He saw a continuing need for "race-conscious" programs to aid institutions in their search for diversity, and noted, as did Pitts, that long decades of prejudice had resulted in many wrongs still to be compensated for.

Blackwell noted that it remains difficult for minorities to gain entry into institutions and that greater demands are often made of them in the presentation of qualifications than are made of the minimally qualified members of dominant groups. He urged that there be new efforts to communicate to the public several points related to overall admissions policies, among these: 1) that all whites do not necessarily score higher on standard measures than all blacks; 2) that all whites do not gain entry to post-secondary education strictly on a merit basis; 3) that many whites gain admission via special programs, too, and he suggested that such programs somehow be given a better, more positive image.

Blackwell called attention again to the role of the Office of Civil Rights (Department of HEW) during the ten-year period of litigation with nine southern states and Pennsylvania in the Adams v. Richardson case. He noted that this case focused on orders to dismantle dual systems of higher education in those states and to insure equal access for members of all races. This case, Blackwell said, does contain within it a goal of diversity, as does the Bakke case, and he felt that the two cases together had important and continuing implications for both undergraduate and graduate admissions programs. He felt the Adams case might well extend to states in other regions at a later time, and he concurred with observations by Willingham that considerable litigation lay ahead for institutions as a result of Bakke, beyond whatever actions might emerge from Adams.

According to Blackwell, considerable research is needed on how much weight to give to traditional (objective) measures such as test scores, grades, etc. in contrast to special talents and abilities, as one searches for diversity. He felt, as did Beck, that race should appropriately become a plus factor in the admission process and said that race had clearly been approved by the court as one variable in the process.

In her consideration of educational and social implications, Beck also assessed legal aspects of the case, and said she felt that there would be more litigation to come from those who continue to be excluded. She said it was not a healthy sign to have the courts as a partner in educational enterprises, but that she believed in the Bakke case the Court had been imprecise on purpose, and while laying down certain caveats, had left much to the discretion of institutions themselves.

Beck considered the Harvard process which the Court held up as a model to be misleading and not useful for the majority of higher instituitons. However, as mentioned earlier, she did urge institutions to take whatever guidance they could from the Court and move toward reform of their policies and goals in light of the evolving needs of their own campus, and of prospective applicants.

Charles Hardwick, Vice President for Academic Affairs, Texas Tech University, considered some of the issues raised by the Willingham background paper and agreed at the outset that the close and ambiguous nature of the court decision illus-

strated some of the caution and uncertainty in current society as a whole. Does Bakke portend social change in the U.S.? Is it perhaps a reflection of backlash? Hardwick was not sure, but felt that the decision did seem to offer a compromise for the time being. He saw no apparent barriers to institutions pursuing affirmative action goals, and suggested that there would probably be gains in institutional automony as a result of the decision. He tended to agree with Willingham's concluding observation that "overall, Bakke does not give the appearance of any greatly altered social expectation concerning the basic role and functions of higher education."

Hardwick said he thought that higher education may, as a result of Bakke, be obliged to play a more active role in future social change. Interestingly, in the southwestern meeting where Hardwick spoke, as in the subsequent western seminar in San Francisco, there was little or no mention of the application of the Bakke decision to the large Chicano minorities living in those areas. Here, as elsewhere, the discussions and questions centered around blacks.

Probably some of the most provocative comments on the broader implications of the Bakke case came from Alan P. Sindler, Dean, Graduate School of Public Policy, University of California, Berkeley. Sindler agreed with Willingham that the case in many ways reflected national divisions of opinion and priorities, and that there were no simple, direct answers that

would suddenly produce unity. Willingham noted that "the university plays a critical role in society not only for what it represents as a national resource, but also for what it promises in personal development and a sense of a better future. . . . it represents a major avenue of social mobility."

In light of these vital roles, Sindler asked who, what agency, should most appropriately be making decisions on racial preference in admissions? Clearly, it was his feeling that this was not a proper role for the courts, nor that the Bakke decision had been a particularly useful or productive one. . . "a mouse has come out of the end of the judicial pipeline " was the way he summarized it.

He dealt with the place of the court in the political process and structure, and said it was often in an isolated position, removed from the real development of the democratic process. Sindler was especially apprehensive about the position taken by the Brennan group, which, according to him, was "ready to allow the establishment of racial and ethnic quotas to make up for past discrimination." Sindler said that if reparation were a goal for some groups, he would prefer to have the Congress making such decisions, not the Court. He felt that if public opinion were sampled on an issue such as racial preference devices (like the program at U.C. Davis) the vote of the people would be "overwhelmingly" against them.

Sindler said he could foresee continuing problems for many minority groups who were seeking equal protection and opportunities in the days ahead. How, he asked, could we meet all such demands from various ethnic groups? Universities, however, he said would probably be put in a position of extending special considerations to other special interest groups as a result of Bakke, and it was noted during the seminars that a number of such cases are still before various courts at present, still to be decided.

During questioning, Sindler reiterated his concern over "severe and genuine" splits in the court and in public opinion throughout the country. He repeated his belief that Congress was probably the agency best suited to determine policy in the whole area of affirmative action and equal educational opportunity, though he noted that there was probably a role for state legislatures, too, and perhaps students. He concluded with observations that the Harvard plan was successful and defensible because of its diffuseness and lack of precision, and said he believed it to be litigation-proof.

Implications for undergraduate admissions policies. . . expanded emphasis on responsiveness, reform, and remediation

Obviously, many implications of the Bakke decision for undergraduate admission were woven like patterns throughout the seminar discussions of both legal and social issues. The

prevailing code word of diversity was spoken convincingly by Mr. Justice Powell and buttressed by the status and style of Harvard, and yet there was an irony that this elite example, eloquently phrased, was held up as a model in a case pertaining to medical school admissions. It was abundantly clear that participants in the seminars, along with Mr. Justice Blackmun, were generally dubious that the Harvard program could serve as a bellwether for most instituitons of higher education.

Some viable alternative approaches to Harvard were developed by the admissions team in their background paper. For open door institutions (largely community/junior colleges), the team sees relatively few changes needed, but suggests that since these colleges are especially committed to serving all segments of the local community, they renew efforts to insure racial diversity and to make their programs more widely known and accessible to persons of all races. For "selective but noncompetitive" institutions, the paper suggests "a race-conscious admission policy that could involve the individual review of technically ineligible applicants to determine if the probablitity of success could be considered on par with that of minimally qualified applicants." To help operate such a policy, additional supportive services might be needed by the institution, or they could take into account the particular success of candidates in overcoming prior educational disadvantage.

For more selective institutions, or for anyone wishing to listen, the team paper outlines a series of recommendations, prefaced by a relevant citation from Mr. Justice Blackmun: "I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask this to be so is to demand the impossible. In order to get beyond racism, we must first take account of race."

Each institution, the paper suggests, should develop and publicly state its policy and goals in the area of affirmative action. "Every effort should be made to project an image of receptivity to minority students," the team recommends. To support such activities, they strongly urge a series of special recruitment efforts; reformed admissions and financial aid policies incorporating some of the key elements of the Manning plan; academic support programs; provision of better counseling on campus; and new research.

A common and persuasive thread recurred in all the seminar presentations by admissions officers and focused on implications for the profession. It was that while some reform and more creativity were needed in the admissions process, the real obstacles to equal educational opportunity were rooted far down in the grades, in the elementary and secondary schools. And, further, that because of these past problems, a period of intensive remedial work also still loomed ahead for colleges and

universities, helping students already on campuses, or soon to be there.

Fred Hargadon, Dean of Admissions, Stanford University, for instance, said much better fundamental preparation was needed for minority students, and that most efforts to date had not been effective. He said he did not think the quality of minority candidates had improved much over the past ten years. Hardwick also stressed the need for better preparation, and added that there was a similar and important need for remedial help on campus. Cushman echoed the theme in Philadelphia, arguing for strong remedial programs for "most high school graduates, black and white." E. Eugene Oliver, Director, School and College Relations, University of Illinois, Central Office, who has a background in teaching, counseling, and school administration, said he believed that the court decision would apply equally to public and private institutions, citing Fitt's background analysis that "a public institution with a Davis-type program might also fend off a Title VI suit by challenging the plaintiff's standing. But since public institutions are governed by the 14th Amendment, a disappointed applicant would have standing to sue on that basis if not under Title VI."

Oliver suggested the need for a recasting and a reformulation of many admissions programs in light of the decision, renewing the search for diversity by geography, race, special ability, etc., moving promptly to eradicate quotas; and discon-

tinuing any multi-track activities. Along with others, he urged that there be more vigor and inventiveness in the promotion of equal opportunity, and cogent statements of desired goals by institutions. He felt most of the ten points proposed by Winton Manning and cited by the admission team were useful and workable. Oliver noted that the emphasis on academic and institutional freedom and rights were very positive manifestations of the Court's decision in the Bakke case.

Walter Snickenberger, Vice President for Student Affairs, Southern Methodist University, and former admission officer at Cornell University, said the main implications for institutions were that they must avoid rigid criteria for admissions, and should keep their policies broad, general, and clear, and should "abide by them before, during, and after admission." He urged officers to keep good records of their decisions and be prepared to justify them. Snickenberger joined others in indicating that any form of set-aside or earmarking of financial aid funds for minority groups would be ill-advised and probably illegal. Snickenberger also described some of the problems facing private universitites in their search for greater minority enrollments, particularly those involved in providing adequate financial aid in light of the continuing need to rely on tuition sources.

Considering other aspects of the decision for admissions officers, Hargadon saw a real dilemma in the issue of individual versus group rights, and said he endorsed the continuing use of "traditional" criteria in making future decisions. He said he

believed these measures, including objective tests, had exerted a democratizing effect on admissions. He said that in his opinion there was a growing need for better public and mass media understanding and treatment of the details of how the college admissions process actually worked, and that there should be clarification, for example, of the important distinctions between "disadvantaged" and "minority."

Hargadon felt that some of the details of points recommended by Manning would cause problems for admissions officers, that of "due process" for all candidates, for instance. He said there was still an urgent need for more data on minority populations, on their progress or lack of it, and cited this as a special reasearch priority. He wondered how an institution might best define "diversity" because of the many forces contributing to or influencing an institution's definition, including the faculty, alumni, etc. He said it would be difficult to prove that diversity was good, or even that it works to achieve the goals attributed to it. (A footnote to the Powell opinion quotes President William Bowen of Princeton on the benefits of a diverse student body. . . . "a great deal of learning occurs informally. It occurs through interactions among students of both sexes: of different races, religions, and backgrounds; who have come from cities and rural areas. . . . people do not learn very much when they are surrounded only by likes of themselves."

Hargadon said he felt it was difficult to work with subjective factors in the search for and selection of more minority students, but that universities continue to do this, along with improving their understanding and use of traditional measures, and, in the end, must continue to take some risks -- but without always looking over their shoulders for further court actions or interpretations. He said decisions would have to be made on the basis of probability, based on some historical evidence and clues, and in concluding, compared this process to that of life insurance which operates on the premise that while the course of one life cannot be predicted, the course of a thousand lives can.

Jeannette B. Hersey, Dean of Admissions, Connecticut College, agreed with earlier proposals that admissions offices would need to become increasingly accountable, in the general tenor of the Manning points (though she questioned certain of his details), and that both policies and practices should be more clearly defined and communicated to the public. She urged the College Board to consider the development or sponsorship of additional seminars or training activities on the admissions procedures, record-keeping, etc., and supported the concept of colleges being better prepared to document and explain rejections.

Thomas F. McDonald, Director of Admissions and Testing, State University System of Georgia, found much ambiguity in the Bakke decision, compounding the difficulties faced by southern states under the Adams v. Califano case. He said

that while some historical barriers to access had been removed, others remained, and that Bakke might portend additional help, but he envisioned difficult times still ahead as institutions of various types sought to respond to many pressures of individual and group demands, and governmental mandates.

Reflecting upon the Bakke decision and its antecedents in the social and educational upheavals of the 1970's, Conrad J. Sharrow, Director of Admissions, St. Lawrence University, felt that the Court's findings and internal divisions reflected important areas of tension and dissent in the national character. He said the college admissions officer had been thrust more into the public spotlight in an increasingly litigious world. He belived that court actions were still to come, but agreed with David Riesman that "litigation is a bad way of solving complex social issues."

Perhaps the best and most concise summation of the seminars was offered by Chicago Tribune columnist Joan Beck in writing about the meeting at Northwestern University:

> "what was obvious and encouraging was how hard the admissions officers, the lawyers, and the university officials seemed to be working toward the end of increasing minority representation in colleges, despite the confusion over means."

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APPENDIXES

Appendix A

The Decision in Regents v. Bakke: Legal Implications for the College Admissions Process

by

Alfred B. Fitt

July 1978

A paper prepared for a series of seminars sponsored by the College Board during the summer of 1978 on the implications of the Supreme Court's decision on the Bakke case for undergraduate admissions.

The purpose of this paper is to describe the legal road map provided to college admissions officers in the Bakke decision, and to explain how the Supreme Court divided in reaching that decision. Because the procedural details of Bakke's lawsuit were crucial for some of the justices, this paper begins with a recitation of those details.

The University of California-Davis Medical School set aside 16 places for disadvantaged racial and ethnic minorities in its entering class of 100. The preferred applicants could compete for any of the 100 places. All others could compete for only 84.

Allan Bakke, a white man, just missed gaining one of the 84 places in 1973. He sued, claiming the Davis program violated the federal and California Constitutions and Title VI of the federal Civil Rights Act of 1964. The trial court held that while Bakke's federal Constitution 14th Amendment equal protection rights had been violated by the 16 places set aside, he had not proved he would have been admitted but for the violation.

So the trial judge ordered the medical school to consider Bakke's application again without regard to his or any other applicant's race. In what was clearly an afterthought, the judge without elaboration also ruled that Davis had violated the state Constitution and the Civil Rights Act.

The Supreme Court of California, citing only the 14th Amendment, declared -- though with a troublesome lack of precision -- that race could not be a factor at all in a state medical school's admissions process. The court reversed the trial judge on the burden of proof question: it was not up to Bakke to prove he would have been admitted but for the 14th Amendment violation; rather, it was up to the medical school to prove he would not

have been admitted.

The University then conceded it could not prove Bakke would have lost out had all 100 places been in open competition. The California Supreme Court, acting on that concession, amended its judgment, that is, its formal ruling (in contrast to the opinion explaining the ruling), to order Bakke's admission to the medical school.

And so the case in time arrived at the door of the Supreme Court of the United States. That court responded by asking the contestants to discuss the federal issue which had received scant attention in the trial court and none from the California Supreme Court: did Title VI of the Civil Rights Act of 1964 prohibit the kind of racial classifications used in the Davis admissions process? (The court prefers, when it can, to decide cases on statutory rather than constitutional grounds.)

Title VI provides that:

> No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in ... any program or activity receiving federal financial assistance.

For Justice Stevens, with whom Chief Justice Burger and Justices Stewart and Rehnquist agreed, Title VI disposed of the case. Davis received federal financial assistance and, in this quartet's view, had excluded Bakke on account of his race: end of case. They did not reach a constitutional issue at all.

Justice Stevens pointed out that technically, since Bakke's admission had already been ordered by the California Supreme Court, there was no surviving lower court judgment barring consideration of race in passing on his or anyone's application. In these circumstances:

> It is therefore perfectly clear that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate.

What was "perfectly clear" to the Stevens quartet was not at all clear to the other five justices -- a majority of the court.

Justice Powell was unwilling to uphold the specific program at Davis, but he was also unwilling to be silent on what a great many people had supposed to be the central issue in the Bakke case: under what circumstances, if any, may race be lawfully considered in determining who gains a professional school place when there is not enough room for all qualified applicants.

First of all, Justice Powell brushed Title VI aside, holding that the statute forbade only those racial classifications that would violate the federal Constitution, thus leading himself straight to the task of deciding what the 14th Amendment's equal protection clause meant for Allan Bakke.

The clause reads: "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." But many cases have held that the clause does not bar all racial classifications; the Supreme Court has never ruled that the Constitution is color blind. So Justice Powell examined the arguments advanced by the University to justify the Davis program.

There were at least two purposes he thought would warrant use of race in the admissions process. One would be the elimination or amelioration of the disabling effects of identified past discrimination. But because aid to "relatively victimized groups" must, at least in a medical school admissions

case, come "at the expense of innocent individuals," Justice Powell would first require judicial, legislative or administrative findings of past constitutional or statutory violations. There were no such findings in the Davis case, except possibly by the Davis faculty, a body that in the justice's view lacked both authority and competence to decide such matters.

The other purpose involving racial classifications that Justice Powell approved is the attainment of a diverse student body. Such a purpose is not merely permissible, it is sanctioned and protected by the First Amendment -- under a strong line of prior Supreme Court decisions. But Justice Powell thought the Davis program went too far:

> It tells applicants who are not Negro, Asian, or 'Chicano' ... no matter how strong their qualifications, quantitative and extracurricular, including their own potential for contributing to educational diversity, they [will not be] afforded the chance to compete with applicants from the preferred groups for the [16 set-aside] seats ... The fatal flaw in the [Davis] program is its disregard of individual rights as guaranteed by the Fourteenth Amendment.

Having condemned the Davis program, Justice Powell went on to give a quite explicit constitutional blessing to the Harvard College program, as described in an appendix to a brief submitted in the Bakke case by Columbia, Harvard, Stanford and the University of Pennsylvania. That description also appeared in full as an appendix to Justice Powell's opinion and in turn is an appendix to this paper.

The appendix will speak for itself to every reader, but to summarize: In making up its freshman class, Harvard strives for diversity, including racial diversity, and pays attention to numbers but does not have a number

for blacks or athletes or Kansans or whatever. As Justice Powell put it:

> This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname.

The four remaining justices -- Brennan, White, Marshall and Blackmun -- upheld the plan used at Davis. In a footnote, they added:

> We also agree with Mr. Justice Powell that a plan like the 'Harvard' plan is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.

Justice Powell put no period to his blessing of the Harvard plan; for him, presumably the goal of student body diversity may always warrant consideration of race. The qualifier in the Brennan group footnote leaves open the question of how long they would sanction the Harvard plan. Justice Blackmun, in a separate opinion, offered a clue:

> I yield to no one in my earnest hope that the time will come when an 'affirmative action' program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most. But the story of Brown v Board of Education, decided almost a quarter of a century ago, suggests that that hope is a slim one.

Some critics of the court have said the Harvard plan is nothing more than the Davis program done with a smirk and a wink. The Brennan quartet itself thought there was no constitutional distinction between the two, and both were permissible:

> It may be that the Harvard plan is more acceptable to the public than is the Davis 'quota.' If it is,

> any state, including California, is free to adopt it in preference to a less acceptable alternative, just as it is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program. But there is no basis for preferring a particular preference program simply because in achieving the same goals that the Davis Medical School is pursuing, it proceeds in a manner that is not immediately apparent to the public.

Justice Powell insisted the two plans were different: in his view Davis deliberately discriminated against whites and Harvard did not. Granted that the results might be alike, the means of getting there were not, and "a boundary line is none the worse for being narrow." Justice Powell put a good faith burden squarely on those who administer college admissions programs:

> A Court would not assume that a university, professing to employ [an ostensibly] nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system.

In any event, and by whatever route, there are five current votes for the Harvard plan among the nine justices now serving; and there may be more votes for it lurking in the Stevens quartet, awaiting the time and the case those four think appropriate to declare themselves.

There are also five current votes against the Davis program -- and four in its favor -- but the route by which the five got there does make a difference for private colleges and universities. The Title VI route leads to practically all such institutions, for practically all receive federal financial assistance. But the 14th Amendment route does not ordinarily lead to private colleges and universities, for it is concerned only with state action.

The difference is not meaningless. Only the Stevens quartet ruled that an individual has a right to sue under Title VI (and even their opinion left open a tiny possibility that the ruling might have been different if the University had objected when Bakke first sued it).

Justice White wrote a separate opinion solely for the purpose of flatly stating that individuals may not sue to enforce Title VI; it is enforceable only by the federal government. The other four justices preferred to wait for another case and a crisper presentation of the issue before deciding the point. So it is possible that a private institution with a Davis-type program, now sued under Title VI by a disappointed applicant, could still successfully contend that the plaintiff had no right to invoke the statute. But it would be imprudent to place a large wager on such an outcome.

A public institution with a Davis-type program might also fend off a Title VI suit by challenging the plaintiff's standing. But since public institutions are governed by the 14th Amendment, a disappointed applicant would have standing to sue on that basis, even if not under Title VI.

There remains a slim and somewhat strained possibility that a majority of the court would approve the constitutionality of a Davis-type program. The Brennan quartet has already done so. Any of the Stevens quartet could be of the view that Title VI banned the Davis program but the 14th Amendment did not. (The Stevens opinion characterized Title VI as having "independent force, with language and emphasis in addition to that found in the Constitution.") So if a plaintiff in another case had to rely solely on the Constitution -- forcing the Stevens quartet to confront the issue it avoided in

Bakke -- there might turn out to be five votes for upholding the constitutionality of a Davis-type program.

Bakke applied to Davis in both 1973 and 1974. He sued promptly after his second rejection, so the case was not complicated by an argument over whether he had waited too long. There may be such complications in suits that now might be brought against other institutions on the strength of the decision in the Bakke case. The extent to which a right newly vindicated for one person will be vindicated for others newly complaining of similar past violations is not amenable to a general rule. The facts and the timing of the particular cases, if any arise, will be decisive.

Presumably most colleges and universities do not have to look backward for the implications of the Bakke case, because they have not been following the practices a majority of the court condemned. But they do have to look forward, and the Bakke decision provides an unambiguous chart for what is permissible under the federal Constitution and Title VI.[1]

It is absolutely clear, and indeed was never put in legal doubt at any stage of the Bakke case, that colleges and universities may actively seek minority students for undergraduate, graduate and professional programs, and in doing so may use recruiters and admissions officers of the same race or ethnic background as the applicants being pursued.

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1. The possible relevance of state constitutions and statutes was not involved in the Supreme Court's decision and is beyond the scope of this paper. Ordinarily, conduct permitted under the federal equal protection clause is also permissible under the states' constitutions.

There is unquestionably a legal hazard in considering minority applications separately from all other applications, or in a variant that has a separate admissions subcommittee for minority applications, with the full committee in practice automatically adopting the recommendations of the subcommittee. The hand of good faith does not hold a rubber stamp.

But most important of all, five members of the Supreme Court have declared legal and constitutional, and none has declared illegal or unconstitutional, the consideration of race in selecting students -- undergraduate, graduate or professional -- by a process that conforms to the Harvard plan. Many colleges have already been following that course, because to do so seemed socially and educationally imperative. They now have a constitutional blessing to stay on course. Those who may have hesitated, out of legal concerns, need do so no longer.

APPENDIX

Harvard College Admissions Program

For the past 30 years Harvard College has received each year applications for admission that greatly exceed the number of places in the freshman class. The number of applicants who are deemed to be not "qualified" is comparatively small. The vast majority of applicants demonstrate through test scores, high school records and teachers' recommendations that they have the academic ability to do adequate work at Harvard, and perhaps to do it with distinction. Faced with the dilemma of choosing among a large number of "qualified" candidates, the Committee on Admissions could use the single criterion of scholarly excellence and attempt to determine who among the candidates were likely to perform best academically. But for the past 30 years the Committee on Admissions has never adopted this approach. The belief has been that if scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual excellence and that the quality of the educational experience offered to all students would suffer. Final Report of W. J. Bender, Chairman of the Admission and Scholarship Committee and Dean of Admissions and Financial Aid, pp. 20 *et seq.* (Cambridge, 1960). Consequently, after selecting those students whose intellectual potential will seem extraordinary to the faculty—perhaps 150 or so out of an entering class of over 1,100—the Committee seeks—

> variety in making its choices. This has seemed important . . . in part because it adds a critical ingredient to the effectiveness of the educational experience [in Harvard College] . . . *The effectiveness of our students' educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds and career goals as it is by a fine faculty and our libraries, laboratories and housing arrangements.* (Dean of Admissions Fred L. Glimp, Final Report to the Faculty of Arts and Sciences, 65 Official Register of Harvard University No. 25, 93, 104–105 (1968) (emphasis supplied).

The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions. Fifteen or twenty years ago, however, diversity meant students from California, New York, and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians. The result was that very few ethnic or racial minorities attended Harvard College. In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. Contemporary conditions in the United States mean that if Harvard College is to continue to offer a first-rate education to its students, minority representation in the undergraduate body cannot be ignored by the Committee on Admissions.

In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.

In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. At the same time the Committee is aware that if Harvard College is to provide a truly heterogenous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1,100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted. But that awareness does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only "admissible" academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.

The further refinements sometimes required help to illustrate the kind of significance attached to race. The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently-abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it.

Appendix B

Some Educational and Social Implications of University of California v. Bakke

by

Warren W. Willingham

July 1978

A paper prepared for a series of seminars sponsored by the College Board during the summer of 1978 on the implications of the Supreme Court's decision on the Bakke case for undergraduate admissions.

What accounts for a court case becoming a household word? For several years the developing case of Regents of The University of California v. Allan Bakke has been recognized as a critical test of affirmative action in higher education with possible implications for other fields as well. On that basis alone it is easy to understand the blizzard of scholarly writing and the intense interest of the media. There is also the fact that the case is readily understood and brings into focus in the public mind the idea of reverse discrimination.

The drama and importance of the case is heightened by the fact that higher education lies close to our sources of pride and aspiration. The university plays a critical role in society not only for what it represents as a national resource but also for what it promises in personal development and a sense of a better future. College and advanced training represent a major avenue of social mobility for young people who do not have the capital or the connections necessary for many careers and must advance primarily on their wits. Thus, admissions policy is not only a very significant aspect of how higher institutions function; it also has serious social consequences and tells us a good deal about our culture and how we judge our fellows.

In addition to its intrinsic interest and importance, Bakke has complex ramifications that will take time to unravel and more time to clarify through subsequent debate and litigation. Some of the ramifications have more to do with the style and role of higher education than with specific policy or practice. The purpose here is to stimulate discussion by focusing upon a few broad questions that are suggested by the decision and appear to have significant educational and social implications.

It is useful first, however, to comment on the nature of the Bakke decision. The court's action in Bakke consists of a) two one-paragraph decisions, each supported by a largely nonoverlapping majority of five Justices; b) some ten pages of factual background information with which five Justices concur; and c) some 140 pages covering six minority opinions supported by one to four Justices. The exact language of the decisions helps one to appreciate their sparseness. The following two paragraphs quoted from Justice Powell's announcement constitute the full Bakke decision:

> For the reasons stated in the following opinion, I believe that so much of the judgment of the California court as holds petitioner's [University of California] special admissions program unlawful and directs that respondent [Allan Bakke] be admitted to the Medical School must be affirmed. For the reasons expressed in a separate opinion, my Brothers THE CHIEF JUSTICE, MR. JUSTICE STEWART, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS concur in this judgment.
>
> I also conclude for the reasons stated in the following opinion that the portion of the court's judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed. For reasons expressed in separate opinions, my Brothers MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN concur in this judgment.

The case is unusual because the only things about which we can be certain are those found in the brief statements above. All else of

substance is minority opinion having no force of law and limited precedence. Ordinarily, the reasons given for a decision have great value in understanding the boundaries of application and the likely outcome of subsequent litigation on similar issues. Unfortunately in this case, to some uncertain extent, the Justices concurring in the two majority decisions do not agree on why they agree.

There are several consequences of this lack of a majority opinion. The most obvious is the limited guidance provided. The meaning of the decision will be left largely to interpretation by parties other than the Justices themselves. Extensive litigation will likely result from efforts to clarify the situation, and over time the Court could exercise considerable latitude in specifying what is meant by "any consideration to race." The likely direction of that latitude is difficult to foresee because the court was badly split. Needless to say, these circumstances do not make for sweeping rulings as was true of Brown in 1954. Finally, one draws broad generalizations from such a decision only at great hazard, so the reader should beware.

On the philosophical issue of individual versus group equity there seems to be considerable constitutional ambiguity and social cleavage as to how much priority should be attached to one or the other. This value conflict is reflected in the decision which gives every appearance of a political compromise, and from a practical standpoint the decision is likely to cause some confusion as to what consideration of race is permissible. Despite all this ambiguity some matters seem reasonably well confirmed:

- Admissions policies are in large part the responsibility of the institution. Institutions are on firm ground in defining such policy on the basis of their accepted social functions and educational objectives.
- Race is a significant consideration in admissions and is permissible for use as one of several selection criteria. Race is, however, a constitutionally suspect variable and can be used only with care.
- In exercising care it is essential to avoid numeric quotas, classifications, or other procedures which have the effect of setting up a multitrack selection process based on race or other constitutionally suspect variables. The denial of the applicant's right to individualized consideration without regard to race was considered a "principal evil" of the special admissions program disallowed by the court.
- Within these limits, affirmative action is quite acceptable and most higher education programs can probably meet the basic requirements of this decision without great difficulty, though what changes in the selection process may eventually prove desirable or necessary are not yet clear.

Needless to say this brief sketch of what is "confirmed" is greatly oversimplified and will not necessarily match exactly the impression of otners who have considered the case. Bakke raises a number of difficult

issues that will require scholarly analysis and research as well as continued attention in the forums of higher education. Consider the following questions.

Are Current Selection Procedures Educationally Sound and Socially Defensible?

There is now the obvious fact that the admissions program of the Davis Medical School of The University of California or any similar one that involves explicit classification by race is not permissible, but there are no suggestions in the Bakke decision that selective admissions practices are otherwise in legal jeopardy. It is important to note, however, that the decision was narrowly drawn on the use of race in admissions. Other than brief suggestions by Justice Powell, the Court made no effort to engage questions concerning what admissions criteria or procedures are otherwise permissible. Indeed, whether the admissions process is fair, evenhanded, or valid is not likely to be perceived as a concern of the Court except insofar as it involves variables that are suspect on statutory or constitutional grounds. In that situation interest would center, for example, on whether people are classified according to race; that is, whether decisions are made on that basis. As indicated by the recent Horowitz case, the court is inclined whenever possible to leave educational decisions to educators.

Furthermore, the courts are not inclined to restrict educators' judgment as to what are the relevant admissions criteria. The lower court decision in Bakke states it quite clearly, "In addition, the University may properly as it in fact does, consider other factors

in evaluating an applicant, such as the personal interview, recommendations, character, and matters relating to the needs of the profession and society, such as an applicant's professional goals. . . we do not compel the University to utilize only 'the highest objective academic credentials' as the criterion for admission."

On the other hand there have been important suits based upon charges that selection procedures, especially in employment, violate statutory or constitutional rights, and such suits have raised detailed questions about the appropriateness of selection practices and the validity of criteria used (e.g., Griggs v. Duke Power, Washington v. Davis). Other cases are now in the courts, and as already noted, several aspects of Bakke are likely to stimulate suits.

Thus, litigation concerning selective admissions to employment and higher education will no doubt continue to draw the courts into such issues. Because of a generally litigious climate and uncertainty as to how courts may rule, higher education seems likely to carry a heavier burden of accountability regarding admissions practices than is presently the case. Consumerism also seems likely to require more attention to due process in admissions; i.e., clear statements of institutional policy, open description of procedure and the bases for selection, validation of practices, adequate records, and so on. It is likely that many institutions would have difficulty meeting a stiff standard of due process.

There is another sense in which we might question the adequacy of current admissions procedures, and here we draw on Bakke only by implication. It can well be argued that there is need for a broader view

of talent in admissions, a more balanced emphasis on admissions criteria that usefully supplement traditional academic measures, and a better rationale for connecting these criteria with institutional objectives.

The orientation of the Court in Bakke supports that view in the following sense: admitting students on the basis of some single dimension of talent tends to encourage invidious comparison of minority and majority students. On the other hand, the use of a variety of supplemental admissions criteria that are relevant to different applicant strengths and corresponding institutional objectives makes it clearer that applicants vary as individuals and may often be admitted on the basis of somewhat different evidence of accomplishment or potential.

Justice Powell suggests that, "Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important." Assessing such qualities in a fair and valid manner is a difficult but not insurmountable job. Research and development in this area is badly needed.

What Use of Race in Admissions Will Survive Judicial Review?

The straightforward answer is a selection procedure that does not classify students on the basis of such suspect variables alone but considers race or ethnic background as only one factor. Unfortunately, what that means is not entirely clear because there was no majority opinion giving reasons for the decision. Since race is a constitutionally suspect variable, it is clear, however, that it must

withstand close judicial review--either on statutory grounds or the constitutional standard of "strict scrutiny."

In reaching his own interpretation, Justice Powell cited legal precedence for strict scrutiny of a racial classification saying that in "order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary. . . to the accomplishment of its purpose or the safeguarding of its interest." He argued that achieving diversity in higher education is constitutionally permissible and is a compelling state interest. Since Powell did not view racial quotas or selection within racial classifications as necessary to attain that goal, he endorsed the use of race as only one of a number of admissions criteria.

The Harvard College admissions program was cited by Justice Powell as an exemplar. Harvard stresses various attributes to achieve diversity among the applicants it admits: ". . . students from California, New York, and Massachusetts; city dwellers and farm boys; violinists; painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians. . . [and in recent years] students from disadvantaged economic, racial and ethnic groups." Harvard describes its procedure for achieving diversity not as classifying applicants or meeting targets for special groups of students but rather as one overall competition in which many considerations play a role in the final decision on each individual case.

The Harvard model has received considerable prominence in the Bakke decision (and in the press) because Justice Powell was the swing vote between two groups of four Justices with strongly divergent views. (In fairness it snould be noted that a number of institutions use an essentially similar procedure of their own making.) The irony is that Mr. Powell is evidently the only Justice of the nine who views diversity per se as a compelling state interest. Those Justices siding with Mr. Stevens endorsed no use of race in admissions. Those Justices siding with Mr. Brennan agree with Justice Powell on the use of race as one factor but for different reasons, saying, "[The Harvard admissions process] is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessicated by the lingering effects of past discrimination."

Justice Brennan, et al. note sharply their failure to see the practical difference between the Harvard and the Davis procedure. They argue, ". . . there is no basis for preferring a particular preference program [the Harvard plan] simply because in achieving the same goals that the Davis Medical School is pursuing, it proceeds in a manner that is not immediately apparent to the public." With equal license, Justice Powell observes dubiously that in the view of Justice Brennan, et al. ". . . the pliable notion of 'stigma' is the crucial element in analyzing racial classifications." The reference here is to the latter Justices' minority opinion that "benign purpose" in the use of race satisfies the Constitution. Countering that view, Justice Powell goes on to say, "All state-imposed classifications that rearrange burdens and benefits on

the basis of race are likely to be viewed with deep resentment by the individuals burdened." This legal jousting in the footnotes of Bakke dramatizes the seriousness of the issue though it is likely to give little comfort to harried admissions officers looking for firm ground.

There is an inherent ambiguity in the Bakke decision which prohibits racial classification but permits use of race among other factors. The Harvard-Davis distinction almost invites litigation. Furthermore, if an institution shows a consistent pattern in the use of race as one factor in admissions, may that be viewed as a de facto quota? What of the fairly common informal practice of awarding so many designees among tne applicant pool to the music department, so many to the minority recruiting team, so many to the football coach, and so on? Is it in fact administratively feasible to maintain a diversity that bears reasonable resemblence to institutional objectives without having numeric targets within such classes of applicants? The notion of diversity as a philosophic basis for admissions policy seems a good deal more complicated and potentially troublesome than the Powell opinion suggests.

Bakke also poses practical questions. When does using race as one factor in admissions become a quota? How are institutions to know when they are practicing one and not the other? What characteristics will a preferential admissions plan need to survive strict legal scrutiny? It seems likely that one desirable characteristic would be a clearly articulated rationale as to what qualities the institution considers important in selecting students and how those qualities are evaluated. A second might be concrete evidence that those diverse qualities are actually assessed and considered in selection; that is, that race is not in reality a major classifying variable similar to the Davis selection

process. A third critical aspect would seem to be a selection procedure, openly described, that considers students individually.

As already noted, the Court's decision is sufficiently ambiguous as to leave future development quite open. Meanwhile, institutions will need to take special care to see that admissions programs do not involve either explicit or implicit racial classifications and that they do involve those multiple factors that make sense to the institution and provide the legal justification for using race as one factor. There will be need for research to evaluate the soundness of any new admissions criteria, to develop appropriate techniques for assessing multiple factors, and also to evaluate the long term institutional effects of any modifications in admissions procedure.

How Transportable is the Harvard Admissions Process?

Regardless of the eventual outcome of disputes as to how the Harvard admissions process does and does not differ from the California plan, the Harvard procedure is the one cited as an acceptable example and described in some detail. Accordingly it seems useful to consider implications of its application to other institutions. Three considerations seem particularly pertinent:

1) The Harvard admissions process fits and serves that institution well. The appropriateness of the plan will need to be examined carefully, however, with respect to its reasonableness and appropriateness to the character and objectives of other colleges, graduate departments, and professional schools--many of which differ in fundamental ways from Harvard College.

2) The Harvard admissions system is executed with great care; it is also uncommonly time-consuming. Due to the substantial resources required to implement the system, careful consideration might well be given to what undesirable side effects might result should those procedures be applied widely (e.g., doing it poorly in order to save money).

3) The Harvard approach to admissions may prove less useful for imitation than simply as an illustration of one of many possible applications that the Court will find acceptable. Justice Powell also cited with approval the Princeton approach to admissions described by Bowen and a prototype selection model described by Manning in a recent report of the Carnegie Policy Council.[1] The development of informed judgment in the admissions community as to what are likely to constitute legally acceptable selection procedures will no doubt take time. It seems important that such an effort be gotten under way immediately so that there is no loss of momentum in institutional affirmative action programs.

Do Mandated Affirmative Action Programs in Higher Education Appear Likely?

Following Bakke, is there now greater probability of new legislation or administrative action to encourage actively the admission of minority students, women, and other underrepresented groups and to develop guidelines and procedures for monitoring results of such programs? It seems clear that the answer to this question would be yes if those Justices concurring

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1. See Bowen, W.G. Princeton Alumni Weekly, September 26, 1977; Manning, W.H. Part II of Selective Admissions in Higher Education, Jossey-Bass, 1977.

with Mr. Brennan were in the majority on the Court. They say, for example:

> The Court today, in reversing in part the judgment of the Supreme Court of California, affirms the constitutional power of Federal and State Government to act affirmatively to achieve equal opportunity for all. . . But this [fact that there are many opinions] should not and must not mask the central meaning of today's opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

Observing this interpretation the opposing group of four justices note pointedly that only a majority can speak for the Court or determine the "central meaning" of its judgment. While they preferred not to deal directly with this question, it seems likely that they would hold a contrary point of view to that of Brennan, et al. It is difficult to say where the swing-voting Justice Powell would come down on this issue.

The possibility of mandated programs will no doubt be discussed among interested parties if for no other reason than the fact that the Bakke decision has focused attention on the possibility. There also may be more interest in such programs if affirmative action in higher education is seen to rest uncertainly on the good intentions of institutions. One consideration likely to inhibit any federal program comparable to EEOC is the fact that federal desegregation and affirmative action programs tend to work on numeric targets intended to redress widespread and clearly demonstrated effects of discrimination. It seems evident that the majority of the court do not perceive the situation in higher education to be

comparable. State mandated programs, limited in their goals and application, would appear to be a more likely possibility and in a sense some such programs already exist in the form of state guidelines regarding special admissions.

In Considering the Rationale of Preferential Admissions, How Important are Distinctions Among Types of Institutions?

The Court gave its primary attention to medical schools and otherwise made little effort to differentiate among types of institutions as to the applicability of its arguments and judgments. Until there is a contrary precedent, it seems reasonable to assume that the Court's decision will apply with similar force to all selective admissions to publicly supported programs.

Institutions will, however, respond to the Bakke decision from the vantage point of their own special characteristics and traditional ways of admitting students. Two types of institutional categories deserve some attention. One is the public/private distinction. The extent to which private institutions will be governed by Bakke is not at all clear. Most such institutions receive substantial public funds both directly in support of programs and indirectly through student financial aid. Thus, their immunity from Bakke may be more apparent than real.

On the other hand, it is not certain that the courts will view undergraduate, graduate, and professional school admissions all in the same light. In dealing with constitutionally suspect classifications much depends upon what constitutes a compelling state interest. It is easier to imagine a state justifying a compelling interest in training minority lawyers and physicians than a compelling interest in diversity

for diversity's sake (the Powell argument notwithstanding). Needless to say, it will take time to work out the real and apparent distinctions among types of institutions with respect to permissible practice in preferential admissions.

Has Institutional Autonomy Gained or Lost through The Bakke Decision?

Throughout the Bakke opinions, there is direct and also implicit reaffirmation of Justice Frankfurter's four essential academic freedoms of a university: ". . . to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Justice Powell argues for that academic freedom as a means for the institution to diversify its student body in whatever ways seem most appropriate to its faculty. Justice Blackmun argues that admission is the responsibility of academicians and that management of educational institutions is beyond the province of judges, provided educators perform within legal and constitutional bounds. He concludes, therefore, that ". . . interference by the judiciary must be the rare exception and not the rule." On the other hand, Justice Blackmun's comments seem somewhat inconsistent with the full sweep of his opinion which includes perhaps the strongest argument for mandated affirmative action programs in higher education.

In sum, it is too early to tell. If institutions respond with active efforts to exercise the flexibility implied by the Bakke decision, there could be an important net gain in institutional autonomy. On the other hand, it is possible to imagine the eventual development of mandates

and guidelines that can considerably restrict options and could further complicate the lives of university administrators.

Is Preferential Admissions a Sufficient Response to the Problem of Minority Underrepresentation in Higher Education?

Opinions may vary as to the adequacy of minority representation in higher education, but there has been documented a very substantial improvement in the past decade.[2] Some have argued in fact that minority underrepresentation is not now so much a problem of admissions as one of retention once students are enrolled. Access to educational opportunity will obviously remain critically important, but in some respects it may be unfortunate that Bakke has focused so much attention on selection at the expense of other critical issues: adequate academic preparation, financial assistance, and retention to graduation.

In that sense continued attention to recruitment and admissions is certainly desirable, but not sufficient. Continuing effort will be required to insure that these additional educational problems receive attention and funding. Longitudinal studies of minority students' experience should be helpful in clarifying the needs and developing ways of dealing with them more effectively.

Does The Bakke Decision Signal a Subtle Change of Attitude Regarding the Social Role of Higher Education?

For many generations the American ethos has placed great emphasis on individualism, free enterprise, and advancement through merit. Justice Marshall reminds us that the Bakke problem arises because these social values have been enjoyed largely by white males. But regardless

2. For a summary of relevant studies, see Willingham, W.W., & Breland, H.M. Part III of Selective Admissions in Higher Education, Jossey-Bass, 1977.

of any unfair or limited application, these ideals are nonetheless deeply embedded in the culture. So when the highest Court, even in a limited way, sanctions access to privilege on any grounds save strict merit, it is no surprise that the step is not taken lightly. Similarly when the Court reaches a decision that seems, even in a limited way, to restrict the efforts of institutions in redressing the effects of discrimination, it is no wonder that strong feelings are aroused. An especially significant aspect of the Bakke decision is the fact that it is concerned as much with the justice and health of a pluralistic society as the educational issue with which it ostensibly deals. One can ask, therefore, whether the decision can be seen as part of any larger pattern of changing attitudes about affirmative action or about the role of higher education as a social institution.

Historically, higher education has been seen as a means of transmitting culture, as a training ground for the essential professions, and as an intellectual resource for the nation. These constitute what might be called a scholastic view of higher education. Twenty years ago in the sputnik era the scholastic view was pronounced. There was a strong state interest in developing the research function of the university, in admitting students most likely to do well in its programs, and in keeping institutions free of politics.

Society still has those interests, but it also has a strong interest in insuring individual opportunity and meaningful participation in a pluralistic culture. There is, therefore, a newer societal view wherein higher education helps to equalize social opportunity, provides for

individual development and retraining, facilitates more effective utilization of human resources, and serves as a means of relieving social pressures (particularly among groups suffering under-employment or dislocation in times of recession, war, or other social upheaval).

A gradual shift in the balance from scholastic to societal values actually started with the G.I. Bill over 30 years ago; that trend probably peaked in the "great society" of the mid-sixties. In that period the cause of group equity laid its legal foundations in the Civil Rights Act and its philosophic foundations in the student rebellion.

Depending upon one's orientation and sense of recent history, it is possible to see the Bakke decision as another step away from the traditional scholastic emphasis in higher education or as a regression back to that emphasis. The Court's decision permitting some consideration of race in admissions clearly reflects a societal view of higher education, though not as strongly as some would have preferred. Overall, Bakke does not give the appearance of any greatly altered social expectation concerning the basic role and functions of higher education. It seems rather a recognition of principles long practiced.

In working through the various difficult issues posed by Bakke it seems particularly important to maintain the strong respect this country has had for individual accomplishment and also for real equality of opportunity. Both are hallmarks of the American culture but acts of overt legal and social discrimination in our history have created conditions of disadvantage that make these goals sometimes seem incompatible. There is no reason they should be, but it is critical to bring to bear the intelligence, patience, and compassion to see that both goals are well served.

Appendix C

Implications of the Bakke Decision for Undergraduate Admissions Policies and Practices

by

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A paper prepared for a series of seminars sponsored by The College Board during the summer of 1978 on the implications of the Supreme Court's decision on the Bakke case for undergraduate admissions.

I. BACKGROUND

In 1973, the University of California at Davis had two admissions programs for the entering class of 100 students in its Medical School. The regular admissions program for 84 of those places had a minimum overall undergraduate grade-point-average requirement of 2.5 on a scale of 4.0. About 1 out of 6 of the applicants having met that requirement was interviewed. Each of the regular admissions committee members rated each interviewed applicant (on a scale of 1 to 100), on the basis of the interviewers' summaries, the overall grade-point-average, the science courses' grade-point-average, the Medical College Admissions Test Scores, letters of recommendation, extracurricular activities, and other biographical data. The full regular admissions committee then made offers of admission on the basis of its review of the applicant's file and the "benchmark score" (the total of the committee members' ratings).

The special admissions program was operated by a separate committee, the majority of whom were members of minority groups. If an applicant asked to be considered as "economically and/or educationally disadvantaged," and was judged by the special admissions committee to be so disadvantaged, he or she was rated in a manner similar to that used by the regular admissions committee. However, the special admissions applicants did not have to meet the minimum 2.5 overall undergraduate grade-point-average cutoff, and were not ranked against the regular admissions applicants. The top choices of the special admissions committee were referred to the regular admissions committee, who could deny admission for failure to meet course requirements or other specific deficiencies. This process was continued until 16 special admissions selections had been made.

Allan Bakke applied for and was considered for regular admission in 1973 and 1974. In 1973 he was denied admission because his benchmark score of 468 out of 500 was below the minimum 470 score in effect for regular admissions that year. In 1974 he was rejected with a benchmark of 549 out of 600. In both years special admissions applicants were accepted with significantly lower benchmark scores than Bakke's.

Mr. Bakke then filed suit in state court on the grounds that his exclusion from consideration within the special admissions program was in violation of the Equal Protection Clause of the Fourteenth Amendment, the California Constitution, and Section 601 of Title VI of the Civil Rights Act of 1964. The trial court declared that the special admissions program did violate the Federal and California Constitutions and Title VI but did not order Bakke's admission. The California Supreme Court held that the special admissions program violated the Equal Protection Clause and ordered Bakke's admission to the Medical School.

II. THE DECISION

In its decision in Regents of the University of California vs. Allan Bakke, the U.S. Supreme Court ordered Allan Bakke admitted to the Medical School at Davis. In the 5-4 ruling, four justices supported that order on the grounds that the special admissions program clearly violated Title VI, which bars racial discrimination by any institution that receives federal assistance. A fifth justice supported that order on the grounds that the exclusion of Bakke from consideration in the special admissions program was invalid under the Equal Protection Clause.

The Supreme Court also ruled that the University of California may take race and ethnic origin into account as a factor in its future admissions

decisions. In this 5-4 ruling, four justices concluded that the purpose of overcoming substantial, chronic, minority underrepresentation in the medical profession is sufficiently important to justify the remedial use of race as a factor in university admissions. A fifth justice concurred that race may be considered in admissions decisions, but stated that the goal of achieving a diverse student body is, by itself, sufficiently compelling.

III. IMPLICATIONS FOR ADMISSION TO UNDERGRADUATE INSTITUTIONS

While the Bakke decision specifically deals with admission to a selective and competitive medical school, the central thrust of the ruling has implications for admission to all types of postsecondary institutions. It is clear that formal quotas are not acceptable but, at the same time, the Court permits the use of race or ethnic background as "'a plus' in a particular applicant's file yet it does not insulate the individual from comparison with all other candidates for the available seats."[1]

The Supreme Court ruling leaves intact the bulk of affirmative-action programs that give special consideration to minorities, so long as quotas are not employed. Other factors which might be considered, according to Justice Powell, include, "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated comparison, and/or a history of overcoming disadvantage."[2]

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1. SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner, v. Allan Bakke. On Writ of Certiorari to the Supreme Court of California.

[June 28, 1978], p. 48

2. Ibid.

The implications of the decision for undergraduate institutions will vary depending upon the degree of selectivity in institutional admissions practices. These admissions practices may be broadly defined as open door, selective but not competitive, and competitive.

A. Open-Door Institutions

The effect of the decision on open-door institutions, largely community/junior colleges, seems minimal at first glance. Normally all high school graduates or students above a certain age are admitted and, by definition, no other factors are or need to be taken into account. However, many open-door institutions have particular programs which are in high demand, and for which selection is required. In these cases, a race-conscious admission policy is permitted by the Court's decision and such policies are discussed in the following sections.

Even in nonselective programs, the Court's decision may have relevance. Racial and ethnic diversity in the student body and appropriate representation of minorities are goals held to be sound for all educational institutions. Community/junior colleges have been especially committed to serving all segments of the local community. To the extent that racial diversity and representation are not present, open-door institutions should seek to make their programs more widely known and accessible.

B. Selective, But Not Competitive Institutions

Institutions in this category have admission requirements in addition to graduation from secondary school, but are generally able to accommodate all applicants who meet those standards. Probably the majority of four-year institutions are of this kind although they vary widely in selectivity.

While the Bakke decision dealt with an institution with far more qualified applicants than spaces, the Court's opinion, nevertheless, is relevant to the selective institution which can admit all qualified applicants. Most such undergraduate institutions have a minority enrollment considerably below that which would be proportional to the minority population in the potential applicant group. This underrepresentation was addressed by Justices, Brennan, White, Marshall, and Blackmun, in joining Powell in permitting consideration of race in admissions decisions: "Davis had a sound basis for believing that the problem of underrepresentation of minorities was substantial and chronic, and that the problem was attributable to handicaps imposed on minority applicants by past and present racial discrimination,"[3] and "Davis' goal of admitting minority students disadvantaged by the effects of past discrimination is sufficiently important to justify use of race-conscious admission criteria."[4]

Institutions in which minorities are underrepresented could adopt (or continue) admissions policies which take account of race or ethnic background in defining who shall be considered admissible. Admission standards are typically designed to select students who have a reasonable probability of success. Yet the traditional criteria for measuring admission qualifications (grades and test scores) serve disproportionately to deny admission to minority candidates. Thus, a racially neutral admission policy would do nothing to ameliorate the problem of minority underrepresentation.

In contrast, a race-conscious admission policy could involve the individual review of technically ineligible applicants to determine if

3. Ibid., p. 45

4. Ibid.

the probability of success could be considered on a par with that of minimally qualified applicants. Such a finding could be based on additional supportive services which the institution intended to offer. Or, having overcome prior educational disadvantage could be a basis for predicting success for a particular student. While minority students could routinely receive such special consideration as a means of overcoming the effects of past discrimination and of reducing underrepresentation, other students from disadvantaged backgrounds should be similarly considered.

The selective institution which can accommodate all qualified applicants has the advantage of not having to say "no" to a non-minority applicant in order to say "yes" to a minority applicant. A race-conscious admission policy at such an institution provides special consideration for minority and other disadvantaged students who lack the formal qualifications, but for whom academic success can reasonably be expected.

C. Competitive Institutions

Most of what has been written in Parts A and B of this section also applies to colleges and universities in which the number of qualified applicants exceeds the number of places available. Such institutions may consider race as one of several factors that influence the admissions decision. The Court has determined that diversity "clearly is a constitutionally permissible goal,"[5] and that "racial or ethnic origin is but a single though important element"[6] of that diversity. While the Court rejected the use of quotas, it did provide for race-conscious admissions decisions as long as applications from minorities and non-minorities are

5. Ibid., p. 42

6. Ibid., p. 46

processed together and not separated by race. Further, the Court has reaffirmed the traditional right of institutions to determine their educational practices including the admissions process.

Because of the need to refuse admission to some academically qualified students in order to accommodate some minorities with lower qualifications, institutions employing competitive admissions practices are particularly vulnerable to court action and may expect legal challenges to their admissions practices. However, it seems likely that institutions with well-conceived plans for increasing the diversity of their student populations, for example, a goal of a racial composition that resembles the racial composition of the geographical area generally served by the institution, will find support in the Court's decision on Bakke. Institutions, therefore, must articulate their goals in terms of the degree and nature of diversity they hope to achieve.

IV. RECOMMENDATIONS FOR UNDERGRADUATE INSTITUTIONS

A. Public Statement of Affirmative Action

Justice Blackmun wrote: "I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way, and in order to treat some people equally, we must treat them differently."[7]

Justice Blackmun's eloquent statement highlights the need for institutions to articulate a clear policy of affirmative action. Each institution should develop and publicly state its policy and goals in this area. Every

7. Ibid., Statement by Mr. Justice Blackmun, p. 5

effort should be made to project an image of receptivity to minority students.

B. Special Recruitment Efforts

Colleges and universities should initiate, continue, or expand programs in the recruitment of minority students. The programs should include consideration of such facets as:

1. Development within the admissions staff of special talents for minority recruitment; provision of the total resources to accomplish the college objectives in recruitment.

2. Identification and contact with promising students at an early age to increase the pool of potential college-bound students.

3. Effective contact with school counselors.

4. Cooperation with agencies and organizations that specialize in identifying minority students with college potential.

5. Development of adequate financial aid to attract and to sustain minority students.

6. Development of educational and student life programs which steer students toward success, thus creating personal enthusiasm which causes them to be effective recruiters themselves.

C. Admissions and Financial Aid Policies and Practices

An admissions policy and the process which is a result of the policy should be rational and consistent. Such a process could take many possible forms, depending upon the nature of the institution, the constituencies being served, the size of the admissions staff, and the traditional method of operation of the admissions office. It does appear clear, however, that whatever the form of the process, certain

elements are essential. Reference is here made to the ten points discussed by Dr. Winton H. Manning as being at the core of any admissions process which is to be judged as fair.[8] Manning refers to these ten points as Principles of Good Practice in Admission. These are:

1. Educational institutions should clearly describe their admissions policies and explicitly state how these policies are related to the goals and objectives of the institution.
2. Institutions should publicly describe their admissions criteria, and provide information to applicants sufficient to permit students to make a reasonable estimate of the likelihood of their meeting these standards.
3. Whatever criteria are used, the educational institution should routinely allow applicants the procedural opportunity to demonstrate that those particular criteria or standards are inappropriate for assessing their qualifications.
4. Institutions should use the same admissions process for all candidates considered for the same program.
5. Where exceptions to uniformity of process, criteria, and standards are made for particular classes of applicants this policy should be publicly articulated with particular attention to the legal restraints on such actions.
6. The criteria employed in the admissions process must be validated--that is, demonstrably shown to measure qualities relevant to the legitimate educational objectives of the educational program. Additionally, criteria should not be used which cannot be shown to be reliably assessed.

8. Manning, Winton H., Beyond Bakke: The Unfinished Agenda in Admissions, unpublished paper presented to Inservice Education Program, Education Commission of the States, Denver, Colorado; April, 1978.

7. Upon request, a rejected applicant should be given a statement of the reason(s) for his or her rejection, and a means of appeal by the applicant if he or she challenges the institution's explanation.
8. Selection criteria used by institutions should represent a reasonably broad array of those qualities shown to be relevant rather than relying solely upon a single index of competence.
9. Institutions should ensure that all those who participate in the process of implementing admissions decisions are trained and competent to perform the complex task of evaluating candidates for admission in a fully satisfactory way.
10. Institutions should periodically invite external audit of their admissions policies and practices in order to assure the public and other constituencies that the process that actually goes on is in conformity with publicly stated policies, principles and procedures.

While it may be relatively easy to accept these ten principles, it may be somewhat more difficult to implement them. Institutions may have to make a somewhat larger commitment in resources of both time and money to the admissions process than has been true in the past. The adoption of the principles, however, "would go far to dispel the suspicion of capricious actions and veiled motives - suspicions that too often seem to characterize attitudes towards admissions that are widely held by applicants, their families, and the public at large."[9]

Financial aid as well must be awarded on a rational, equitable, and defensible basis. Whether the institution awards aid strictly on "need," on merit, on athletic promise, or on some combination of the above or

9. Ibid.

other elements, the policy again should be publicly stated. If special consideration is given to some students for admission because of their ethnic background, some recognition must also be given to the fact that this very ethnic background may argue for the award of financial aid packaged differently than for other undergraduate students. Strong consideration should be given to offering disadvantaged students a high proportion of grant aid in contrast to loans. At the same time, it is not desirable for colleges and universities to compete with each other for the "purchase" of students.

The financial resources of each institution may not always be sufficient to meet the financial need of all students. When such as the case, it becomes incumbent upon the college or university to state publicly and clearly the institution's policy toward the award of such aid. It is of little value to consider ethnic background in admitting students and then to place those students low on the financial aid priority list because of possible deficiencies in their previous records.

D. Academic Support Programs

Institutions which give special consideration to race or ethnic background in admission have an obligation to provide academic support programs for students who need such assistance. Such support may take the form of special summer programs, the provision of tutors, reduced course loads, basic skills classes or other services designed to increase retention. Student aspirations can best be maintained by fostering early success.

E. Counseling and Advising

Counseling and advising are critical aspects of the educational life of minority and/or disadvantaged students. They must have a confidant who is compassionate and knowledgeable of the problems these students face who can provide needed guidance and, at the same time, make them feel that they are indeed a part of the educational process of the institution.

F. Research

In its research on students an institution should conduct both internal and external studies related to the students who have been admitted under other than standard admissions criteria. These studies should include an examination of how successful they are in completing their educational programs when compared with those students admitted under standard procedures, and their activities after leaving the institution. In conducting these studies the institution should be alert to the need for corrective action if deficiencies are identified.

Appendix D

List of Seminars and Speakers

Seminar location	Date	Chairman	Reactors
Atlanta, Georgia Oglethorpe University	July 24	Manning M. Patillo, Jr., President, Oglethorpe University	Legal: Charles A. Shanor, Professor of Law, Emory University Social: Robert A. Holmes, Professor of Political Science, Atlanta University Admissions: Thomas F. McDonald, Director of Admissions and Testing, State University System of Georgia
Boston, Massachusetts University of Massachusetts at Boston	July 24	Douglas Hartnagel, Dean of Admissions, University of Massachusetts at Boston	Legal: Daniel Steiner, General Counsel to the University, Harvard University Social: James Blackwell, Professor of Sociology, University of Massachusetts at Boston Admissions: Jeanette B. Hersey, Dean of Admissions, Connecticut College
Evanston, Illinois Northwestern University	August 1	William I. Ihlanfeldt, Dean of Admission, Financial Aid and Student Records, Northwestern University	Legal: Terrence Sandalow, Dean, School of Law, University of Michigan, Ann Arbor Social: James P. Pitts, Assistant Professor of Sociology, Northwestern University Admissions: E. Eugene Oliver, Director, School and College Relations, University of Illinois Central Office
Philadelphia, Pennsylvania University of Pennsylvania	August 3	Donald G. Dickason, Dean of Admissions and Financial Aid, Cornell University	Legal: Robert F. Cushman, Professor of Government, New York University Social: Phyllis W. Beck, Vice Dean, University of Pennsylvania Law School Admissions: Conrad J. Sharrow, Director of Admissions, St. Lawrence University
Dallas, Texas Southern Methodist University	August 8	Lorrin Kennamer, Dean, College of Education, The University of Texas at Austin	Legal: Barbara Aldave, Professor of Law, The University of Texas at Austin Social: Charles Hardwick, Vice President for Academic Affairs, Texas Tech University Admissions: Walter A. Snickenberger, Vice President for Student Affairs, Southern Methodist University
San Francisco University of San Francisco	August 10	William A. Douglas, Director of Student Administrative Services, University of Colorado	Legal: James B. Wilson, Senior Assistant Attorney General, University of Washington Social: Alan P. Sindler, Dean, Graduate School of Public Policy, University of California, Berkeley Admissions: Fred A. Hargadon, Dean of Admissions, Stanford University